

tation of Statutes, at pages 314/315 is a most enlightening passage which reads:

"It is impossible to lay down any general rule for determining whether a provision is imperative or directory. "No universal rule", said Lord Campbell L.C. "can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." And Lord Penzance said, "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory".

It is plain that the object of Rule 10(3) in fixing a time limit for hearing and determining the appeal is to ensure that appeals are speedily dealt with. But the composition of the Appeal Board as prescribed by section 15(3) of the Act makes the unusual practice of fixing of a time limit for completion difficult to implement. We can safely assume that the rule making authority was aware of that. Taking everything into consideration we are inclined to take the view that this requirement is directory rather than mandatory and that non-compliance does not nullify the Board's decision.

In Ground 6, respondent's complaint is that there was denial of natural justice at the hearing before the Appeal Board because without a statement of the grounds on which the Rent Tribunal came to its decision, counsel for respondent was unable to present his case fully and adequately.

We are however inclined to agree with Encik Das that an application for recovery of possession under section 18 for the purpose of development is unequivocal. When a Rent Tribunal makes an order allowing the application it can be on one ground, and one ground only. It would be inappropriate to make comparison between the various grounds on which a Court could make orders for recovery of possession on an application under section 16 with an application to the Rent Tribunal under section 18, but where the latter hears and determines the application under section 13 (1) (a), to determine fair rent, or under section 13 (1) (b) and section 20 to apportion and determine fair rent, or under section 13 (1) (c) for increase of rent, the real importance of giving

A a reason or reasons for its decision becomes obvious, and only in such instances could respondent have good reason to complain.

We would therefore allow this appeal with costs.

B *Appeal allowed.*

Solicitors: *Shook Lin & Bok; Abdullah A. Rahman & Co.*

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### LIM KHEAK TEONG v. PUBLIC PROSECUTOR

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[F.C. (Salleh Abas L.P., Mohamed Azmi and Hashim Yeop A. Sani F.JJ.) June 22, 1984]

[Kuala Lumpur – Federal Court Criminal Application No. 12 of 1983]

E

*Criminal Law and Procedure – Appeal – Question of fact – Acquittal by subordinate court – Evidence to support defence and no misdirection by subordinate court – Whether appellate court can substitute its own finding for that of subordinate court – Burden on defence.*

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The applicant had been charged in the Sessions Court, Kuala Lumpur on two counts under section 4(c) of the Prevention of Corruption Act, 1961. In essence the charges were that he did knowingly use with intent to deceive the Malaysian Government two documents claiming subsistence allowances for two days in December 1975 and January 1976, the total amount for each claim being \$36/-. At the close of the prosecution case the learned President of the Sessions Court called on the defence and the applicant gave evidence. In his evidence the applicant did not dispute that the dates mentioned in the charges were incorrect but stated that it was an honest mistake firstly because when he prepared the claims he merely relied on the dates on the new hotel receipts since he had lost the old receipts and secondly he was very busy with his work at that time. After hearing the defence the learned President of the Sessions Court acquitted the applicant of both charges. In his judgement he stated that after considering the evidence and after observing the demeanour of the applicant, he found that the applicant had succeeded in giving an explanation which was consistent with his innocence. He accepted the explanation of the applicant that it was an honest mistake. On appeal to the High Court the learned judge in his appellate capacity found that there could not be any question of a genuine mistake as the applicant had sufficient time to prepare the claims. He also rejected the learned President's assessment of the demeanour of the applicant since no particulars were sent out as basis of the assessment. The appellate judge substituted a conviction for the acquittal in respect of both charges. The applicant was given leave to refer the following question to the Federal Court – "In an appeal against

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the acquittal from the decision of a Subordinate Court to the High Court raising only questions of fact, where there is evidence to support the defence and there has been no misdirection by the Subordinate Court can the High Court substitute its own finding for that of the Subordinate Court?"

**Held:** the answer must be in the negative. In this case on the facts the President of the Sessions Court had not misdirected himself and the decision was not plainly unsound. The acquittal entered by the learned President should therefore be restored.

*Cases referred to:*

- (1) *Rex v. Low Toh Cheng* [1941] M.L.J. 1, 2.
- (2) *Sheo Swarup v. King Emperor* A.I.R. 1934 P.C. 227, 230.
- (3) *Benmax v. Austin Motor Co. Ltd* [1955] A.C. 370, 375.
- (4) *Thomas v. Thomas* [1947] 1 All E.R. 582.
- (5) *Mat v. Public Prosecutor* [1963] M.L.J. 263.
- (6) *Nadarasa v. Public Prosecutor* [1972] 2 M.L.J. 47.
- (7) *Rajoo v. Rex* [1949] M.L.J. 250.

**FEDERAL COURT.**

*V. Balasingam* for the applicant.

*Mokhtar Abdullah* (Senior Federal Counsel) for the respondent.

*Cur. Adv. Vult.*

**Hashim Yeop A. Sani F.J.** (delivering the judgment of the Court): Applicant was at the material time a News Editor of TV Malaysia earning a salary of \$1,250/- per mensem. On 25/8/1982 he was charged in the Sessions Court, Kuala Lumpur on two counts under Section 4(c) of the Prevention of Corruption Act 1961. In essence the charges were that he did knowingly use with intent to deceive the Malaysian Government two documents claiming subsistence allowances for two days in December 1975 and January 1976 and the total amount for each claim was \$36/-.

At the close of the prosecution case the learned President called for the defence in respect of both charges. The applicant gave evidence. In his evidence, the applicant did not dispute that the dates mentioned in the charges were incorrect but stated that it was an honest mistake firstly because when he prepared the claims he merely relied on the dates on the new hotel receipts since he had lost the old receipts and secondly he was very busy with his work at that time. His superior who was a prosecution witness (PW3) admitted that

**A** applicant was busy during the material period because of shortage of staff.

After hearing the defence the learned President acquitted the applicant of both charges. In his judgment the learned President stated that after considering the evidence and after observing the demeanour of the applicant, he found that the applicant had succeeded in giving an explanation consistent with his innocence. He accepted the explanation of the applicant that it was an honest mistake. He also found the applicant had raised a reasonable doubt on the prosecution's case.

On appeal to the High Court the learned Judge in appellate capacity found that there could not be any question of genuine mistake. In his judgment the learned Judge said there could not be any genuine mistake because the applicant was given sufficient time to prepare the claims. He accepted the evidence of pressure of work but held that the pressure of work could not by any stretch of imagination be an excuse to support the defence of genuine mistake. He also rejected the learned President's assessment of the demeanour of the applicant since no particulars was set out as basis of the assessment. Then purporting to rely on *Rex v. Low Toh Cheng*<sup>(1)</sup> he reviewed all the evidence in the appeal record and held that the learned President had misdirected himself on the explanation of the applicant. The appellate judge then substituted a conviction for the acquittal in respect of both charges.

**Mr. Balasingam** on behalf of the applicant submitted to us four questions for leave under Section 66 of the Courts of Judicature Act, 1964. All four questions clearly overlapped but central to all these questions was the decision of the appellate judge to substitute his own finding on the question of honest mistake for that of the learned President, the finding of the learned President being one substantially of fact. We accordingly allowed leave for one question reframed by us. The question reframed reads as follows:

**I** "In an appeal against acquittal from the decision of a Subordinate Court to the High Court raising only questions of fact, where there is evidence to support the defence and there has been no misdirection by the Subordinate Court can the High Court substitute its own finding for that of the Subordinate Court?"

This is an elementary question of law but we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emper-*

or<sup>(2)</sup> and secondly purporting to follow Terrell, Ag. C.J. in *Rex v. Low Toh Cheng* the appellate judge went into conflict with the trend of authorities in similar jurisdictions.

With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred "*the High Court should and will always give proper weight and consideration to such matters*" as —

- (1) the views of the trial Judge on the credibility of the witnesses;
- (2) the presumption of innocence in favour of the accused;
- (3) the right of the accused to the benefit of any doubt; and
- (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co. Ltd.*<sup>(3)</sup> where he quoted from Lord Thankerton's judgment in *Thomas v. Thomas*<sup>(4)</sup> that:

"Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion."

The learned appellate judge held that the learned President had "misdirected himself on the explanation of the accused." Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was "plainly unsound"? (*Thomas v. Thomas (supra)*). On the facts of this case we do not think so.

The ruling of the appellate judge on the burden of the defence here would therefore seem to be in conflict with rulings already made in similar jurisdictions. We need only mention two. See *Mat v. Public Prosecutor*<sup>(5)</sup> where Suffian J. (as he then was) said:

"The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the

A accused, you must of course acquit."

Also *Nadarasa v. Public Prosecutor*<sup>(6)</sup> where Abdul Hamid J. (as he then was) said:

B "To entitle an accused to an acquittal, it is sufficient if after considering the defence, he has cast a doubt on the prosecution case."

The burden imposed on the defence is a topic much discussed and has become trite law. The principles involved have been consistently followed in this country for nearly half a century and they were succinctly stated in the judgment of the Court of Appeal in *Rajoo v. Rex*.<sup>(7)</sup> There the direction given by the trial Judge on the burden imposed on the two accused was that "they do not have to prove it with the same strictness, but it is for them to give a reasonable explanation." The Court of Appeal rejected this as a correct direction and held that —

C "We say that this direction was inadequate because it failed to explain to the jury that if they thought that the appellant had given an explanation which might reasonably be true, even though they were not convinced of its truth, that would mean that the prosecution had, upon the whole of the case, left them in a state of doubt and so had failed to discharge their burden of proving the accused's guilt. We further say that the direction was incorrect because to say that the accused "do not have to prove it with the same strictness" is to imply that they have to prove their case in some way which is not so strict and that the burden of proof has to some extent shifted to the accused. This is not correct. From the beginning of the case until the end the burden remains upon the prosecution to prove the guilt of the accused."

F Thus our answer to the question posed in this reference must therefore be in the negative.

G Conviction set aside and the acquittal entered by the learned President restored for each of the charges.

H Question answered.

Solicitors: *Joseph & Sons.*

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